**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**Danville Division**

GWENDOLYN SMALLS, as Administratrix
of the Estate of LINWOOD RAYMOND
LAMBERT, JR., deceased

Plaintiff,

vs. CIVIL ACTION NO. 4:15-cv-00017 (JLK)

CHIEF OF POLICE, JAMES W. BINNER,
COLONEL, Individually and in his official
Capacity, et al.,

Defendants.

# PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF QUALIFIED IMMUNITY

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## I. INTRODUCTION

> ***[We] state the conclusion affirmatively. It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who is no longer armed, has been brought to the ground, has been restrained physically by several other officers and no longer is actively resisting arrest.***
>
> ***-- United States Court of Appeals for the Fourth Circuit, Myers v. Baltimore Co., 713 F.3d 723, 731 (4th Cir. 2013)***

On May 4, 2013, the civil rights afforded to all citizens of the United States remained inviolate. Nevertheless, three uniformed police officers wielding tasers electrocuted a defenseless and unarmed man who had been taken to the ground, whose hands were cuffed and legs were shackled. Using repeated, lengthy and repetitive electrical shocks in a hospital parking lot, and then again in the back of the police cruiser, the officers deployed their weapons twenty times amounting to over 4,350,000 volts of electricity. Despite his clear pleas for his life, these three officers continued, resulting in Linwood Lambert's death just yards from the hospital where he was initially brought for medical care. This tragedy was preventable. Eerily, just three months before these horrific events, this Circuit declared unconditionally in *Myers v. Baltimore Co.*, 713 F.3d 723, 731 (4th Cir. 2013) that tasings like these constitute excessive and unreasonable force. Despite this clear, bright line proclamation, three South Boston police officers chose to engage in a cruel, excessive and deadly use of the very force prohibited by the Constitution.

The family of Linwood Lambert brings this case pursuant to 42 U.S.C. § 1983 to address the officers' use of excessive force in violation of Linwood Lambert's Fourth and Fourteenth Amendment rights. Through this Motion for Summary Judgment, the officers ask this Court to declare that their grotesque mistreatment of Linwood Lambert, which is all captured on videotape, is permissible under the Constitution. The officers, however, have not claimed qualified immunity on Plaintiff's excessive force claims under the Fourteenth Amendment.[1] They have only asserted a defense of qualified immunity to Plaintiff's excessive force claims under the Fourth Amendment. Defendants' failure to claim immunity to Plaintiff's excessive force claims under the Fourteenth Amendment ultimately dooms their request for summary judgment on Plaintiff's excessive force claims after they placed Linwood Lambert under arrest. Because they have not requested qualified immunity for Plaintiff's excessive and unreasonable force claims under the Fourteenth Amendment, they will have to stand trial on them.

Even if the Defendants sought immunity for Plaintiff's excessive force claims under the Fourteenth Amendment, they would not be entitled to it. The officers' unnecessary infliction of wanton pain and suffering on Linwood Lambert is much worse than the tasings the Fourth Circuit condemns in *Orem v. Rephann*, 523 F.3d 442, 444 (4th Cir. 2008)(affirming denial of summary judgment on officer's qualified immunity defense in which he twice tased a handcuffed and leg shackled woman in the rear cage of a police car for a total of 1.5 seconds). In this case, though Linwood Lambert repeatedly begged for mercy, the officers gave him none. Lambert asks the officers, "Why are you trying to kill me?" In response to these desperate pleas, the officers bark threats including that they will "light your ass up!" The officers carried out those threats by simultaneously tasing him while he is cuffed, shackled and confined in the back of the police cruiser. The officers' horrifying attack on a defenseless, unarmed, handcuffed, leg shackled and confined man is precisely the type of excessive force prohibited by the Fourteenth Amendment. Defendants do not even bother attempting to justify this behavior under *Orem*. After they violated his civil rights, the officers simply laugh at him.

[1] Defendants claim qualified immunity on Plaintiff's deprivation of medical care claims under the Fourteenth Amendment. The do not attempt to justify, however, their unconstitutional tasings of an unarmed, defenseless, handcuffed, shackled and confined detainee under the Fourteenth Amendment.

Defendants' unlawful actions are captured on videotape and cannot be disputed. Yet, Defendants ask this Court to conclude that their actions were objectively reasonable. To do so, Defendants ignore salient facts which underscore and highlight their excessive and unreasonable conduct:

(1) Lambert was always unarmed;
(2) Lambert voluntarily agreed to be handcuffed;
(3) South Boston Police regulations prohibit the tasing of a restrained person;
(4) During every tasing by the officers, Lambert was handcuffed;
(5) The officers tased Lambert as he sat on the ground outside of the hospital entrance;
(6) Lambert begged the officers for mercy, but they continued to tase him anyway;
(7) South Boston Police regulations prohibit threatening the use of force on a restrained person for failing to comply with verbal commands;
(8) Not only did the officers threaten Lambert with the use of force for failing to comply with verbal commands, they actually used force as punishment for not complying with those verbal directives both while he was on the ground and in the back of the police cruiser;
(9) The officers tased Linwood Lambert twenty (20) times for a total of eighty-seven (87) seconds;
(10) During every one of the twenty (20) tasings, Lambert was either surrounded by the officers or confined in the rear of the police cruiser; and
(11) After the officers shocked Lambert with their taser weapons twenty (20) times for eighty-seven (87) seconds, Officer Mann laughs at Lambert and declares that he is "fucked up."

Defendants intentionally overlook all of these critical facts and assert the predictable and worn out claim that their use of force was reasonable because this defenseless, unarmed, handcuffed, shackled, confined, bloody and injured person posed a danger to them. Defendants must ignore the dire condition they placed Lambert in when they claim that they did not need to get him urgent medical care which was just feet away in the hospital emergency room. No reasonable officer confronted with the same set of facts could credibly claim that the amount of force was reasonable and not excessive. Moreover, no reasonable officer could credibly claim that Linwood Lambert was not in need of medical treatment. To conclude that the officers' actions were reasonable requires this Court ignore the law of this Circuit, the South Boston Police regulations, federal guidelines pertaining to taser use and the actual facts about the encounter captured on videotape.

For these reasons, and those set forth more fully herein, Plaintiff requests Defendants' motion for summary judgment on the issue qualified immunity be denied because of their gratuitous and unlawful mistreatment of Linwood Lambert violates the Constitution.

## II. COUNTERSTATEMENT OF FACTS

### A. Lambert's Interactions with Defendants at the Super 8 Motel

On May 4, 2013, at approximately 4:30 a.m., Corporal Tiffany Bratton ("Bratton"), Officer Clinton Mann ("Mann") and Officer Travis Clay ("Clay") respond to noise complaints at the Super 8 hotel (the "hotel") located in South Boston, Virginia. *See* South Boston Police Department Call for Service Record attached to the Declaration of Thomas N. Sweeney, Esquire ("Sweeney Decl.") as Exhibit "A" at Bates 000002-000006. On May 4, 2013, Bratton was a corporal with the South Boston Police Department ("SBPD"). *See id.* On May 4, 2013, Clay was a patrol officer with the SBPD. *See id.* On May 4, 2013, Mann was a patrol officer with the SBPD. *See id.*

Officers Clay and Mann arrive at the Super 8 Motel first. *See* Statement of Travis Clay attached to Sweeney Decl. as Exhibit "B" at 000046. Officer Clay knocks on the door to Room 109. *See id.* Lambert opens the door to his hotel room and Clay notices Lambert sweating profusely with a white substance draining from his nose. *See* Travis Clay Dep., 10/6/15 (Vol. 1) at 90-91 attached to Sweeney Decl. as Exhibit "C."

Officer Clay notices Lambert was out of breath. *See* Exhibit "B" to Sweeney Decl. at 000046. Lambert tells Clay that people were following him. *See id.* and Exhibit "C" at 93. The officers determine Lambert is unarmed. *See* Exhibit “C” at 97. Officer Mann pulls out his handcuffs Lambert asks, “What are those for?” Exhibit “B” to Sweeney Decl. at 000046-47. Officer Mann responds, “[H]e [Lambert] was not under arrest and it [the handcuffs] would be for his safety as well as ours.” *Id.* at 00047. Corporal Bratton then arrives at the hotel. *Id.*

According to Corporal Bratton, she, “[G]ot Linwood [Lambert] to stand in the hallway while she and Mann checked the room.” Exhibit “B” to Sweeney Decl. at 47. Officer Clay then tells Lambert, “[W]e were here to help him.” *Id.* Lambert tells Officer Clay he “trusted him.” *Id.* Officer Clay perceives that Lambert appeared to be in “psychiatric distress” at the hotel. Exhibit “C” to Sweeney Decl. at 96. Before departing the hotel, Officer Mann observes Lambert, “sweating profusely, hallucinating, talking gibberish, and [that] his speech was slurred.” Statement of Officer Clinton Mann, 5/4/13, attached to Sweeney Decl. as Exhibit “D.” Corporal Bratton also observes Lambert sweating profusely at the hotel. *See* Tiffany Bratton Dep., 10/8/15, (Vol. 1) at 92 attached to Sweeney Decl. as Exhibit “E.”

Corporal Bratton handcuffs Lambert’s hands behind his back. Exhibit “B” to Sweeney Decl. at 000047. Lambert does not resist when Corporal Bratton handcuffs him. Exhibit “C” to Sweeney Decl. at 96-97. Lambert never attempts to harm any of the officers at the hotel. *See id.* According to Officer Bratton, “I asked Lambert to turn around and place his hands behind his back but he was not under arrest. I placed him in handcuffs and told him that we were taking him to speak with someone that could help him. Lambert complied and walked to the parking lot.” Tiffany Bratton Statement, 5/4/13 at 4 attached to Sweeney Decl. as Exhibit “F.” Before exiting the hotel, Bratton tells Lambert, “You are not under arrest, we are going to take you somewhere for somebody to talk to you.” *See* Bratton Dash Cam Video at 4:54:35-4:55:40

attached to Sweeney Decl. as Exhibit "G." At 4:54 a.m., Lambert walks out of the hotel with his hands cuffed behind his back. *See id.* at 4:54:57-4:55:09.

**B. The Emergency Custody Order Transport to the Hospital**

Officer Clay transports Lambert to Halifax Regional Hospital (the "hospital") under an Emergency Custody Order ("ECO") to for evaluation of an apparent medical/psychological condition. *See* Exhibit "C" to Sweeney Decl. at 13. An ECO is a medical emergency. *See* Clinton Mann Dep., 10/7/15 (Vol. 1) at 43 attached to Sweeney Decl. at Exhibit "H." Officer Clay's two dash cameras capture the transport of Lambert to the hospital. *See* Clay Dash Cam Video (Front View) attached to Sweeney Decl. as Exhibit "I"; *see also* Clay Dash Cam Video (Rear View) attached to Sweeney Decl. as Exhibit "J."

Lambert was not charged with any crimes when the officers transport him to the hospital. *See* Exhibit "C" to Sweeney Decl. at 74. Clay tells Lambert, "We are not locking you up, what we are doing is, we are going to take you to the emergency room, get you looked at and make sure you are good to go." Exhibit "J" to Sweeney Decl. at 0:20-0:34. At approximately 4:58 a.m., Officer Clay leaves the hotel parking lot with Lambert. *See* Exhibit "G" to Sweeney Decl. at 4:58:10-4:58:15.

On the drive to the hospital, Clay tells Lambert, "We are just taking a little ride." Exhibit "J" to Sweeney Decl. at 1:43-1:45. The ride takes seven minutes. *See e.g.* Exhibits "I" and "J." During the drive to the hospital, Officer Clay perceives that Lambert is "scared and paranoid." *See* Exhibit "C" to Sweeney Decl. at 98. Officer Clay responds to Lambert and says, "I told you, you trust me." Exhibit "J" to Sweeney Decl. at 4:00-4:03. Clay testifies that Lambert believed people were following his vehicle to the hospital for the purpose of harming him. *See* Exhibit "C" to Sweeney Decl. at 22.

### C. Lambert's Arrival at the Hospital

At approximately 5:05 a.m., Clay and Lambert arrive at the hospital. *See* Exhibit "I" to Sweeney Decl. at 5:54-6:00. When they arrive at the hospital, Lambert is handcuffed and unarmed. *See* Exhibit "C" to Sweeney Decl. at 19-20. When Officer Clay pulls into the parking lot, Lambert kicks out the glass of the passenger window of the police cruiser. *See* Exhibit "C" to Sweeney Decl. at 100. After the kicking out the car window, Lambert remains in the back of the vehicle with the door closed. *See* Exhibit "J" to Sweeney Decl. at 6:50-6:55.

Clay opens the door to the police car, with his taser drawn and yells at Mr. Lambert to "calm down." *See* Exhibit "C" to Sweeney Decl. at 100 and Exhibit "J" to Sweeney Decl. at 6:55-7:15. Officer Clay's dashboard camera video depicts the following:

| | |
|---|---|
| Clay: | I told you don't, quit. Calm down. Calm down. |
| Lambert: | Sir, take me to the emergency room, now. |
| Clay: | (Screaming) We (sic) at the emergency room. |
| Lambert: | Ok. |
| Clay: | (Screaming) Calm down! |
| Lambert: | Ok sir, I'm going to calm down. |
| Clay: | (Screaming) Calm down! |
| Lambert: | I will. |
| Lambert: | I told you guys who my momma was, where my room was, everything. |
| Clay: | (Screaming) We good, we at the emergency room, calm down. |
| Lambert: | Ok. Please sir, I'm done. Ok. Ok. |

Exhibit "J" to Sweeney Decl. at 6:58-7:20.

Mann proceeds to the rear passenger door side of the vehicle and notices that Lambert was "scared and paranoid." *See* Exhibit "D" to Sweeney Decl. at 2. Before opening the door, Mann hears Lambert say, "[Lambert] needs help they're going to get him." *Id*. Lambert exits the vehicle. *See* Exhibit "J" to Sweeney Decl. at 7:24-7:28. When Officer Mann opens the door, he claims Lambert fell out of the vehicle. *See* Exhibit "D" to Sweeney Decl. at 2. Lambert runs from the police car toward the hospital with his hands cuffed behind his back. *See* Security

Video of Halifax Regional Hospital attached to Sweeney Decl. as Exhibit "K" at 8:36-8:43. Lambert runs directly into the doors of the staff entrance to the emergency room. *See* Exhibit "I" to Sweeney Decl. at 7:28-7:31. As Lambert runs toward the emergency room he yells; "I want to go to the emergency room." Statement of Travis Clay to the Virginia State Police, 5/6/13, at 2 attached to Sweeney Decl. as Exhibit "L." After Lambert ran into the emergency room doors, "he backed up into the corner where they [Bratton, Mann and Clay] all cornered him." *Id.* The officers then surround Lambert. *See* Exhibit "I" to Sweeney Decl. at 7:28-7:31. Officer Clay admits that the officers never warned or made the "announcement of taser, taser, taser" before shocking the unarmed, handcuffed, and surrounded Lambert. Exhibit "L" to Sweeney Decl. at 2.

Despite Defendants allegations to the contrary, Lambert never verbally or physically threatened the officers before they tased him. Officer Clay testified, as follows:

> Q. Okay. So going back to the Halifax Regional Hospital; when you get there, after Mr. Lambert has already kicked out the window, you open up the drive's side door. At that point, did you take your taser from your holster?
> A. Yes, sir.
> Q. Okay. So from when you opened the door on the driver's side, Mr. Lambert didn't make any attempt to physically harm you; correct?
> A. No, sir.
> Q. Before exiting the vehicle?
> A. No, sir.

Exhibit "C" to Sweeney Decl. at 23-24.

### D. The Officers Tase a Defenseless, Unarmed and Handcuffed Man.

Officer Bratton and Officer Clay then simultaneously tase a handcuffed and unarmed Lambert in front of the emergency room doors. *See* Exhibit "J" to Sweeney Decl. at 7:32-7:34; Exhibit "D" to Sweeney Decl. at 2. When they tase him for the first time, Lambert is handcuffed, unarmed, surrounded and not fleeing. *See* Exhibit "C" to Sweeney Decl. at 19-21, 181. Officer Travis Clay testified as follows:

Q. Now, at the time that Mr. Lambert was first tased by you, he was running away; correct?
A. At this time, no. He – he had run away and ran – ran against the sliding door, and he had turned around, and that's when I deployed my taser.
Q. Okay. His hands were restrained, correct?
A. That's correct.
Q. And actually before you left the Super 8 Motel, you searched him to make sure he didn't have any weapons; correct?

***

A. That is correct.
Q. So you would agree with me that he was also unarmed?
A. That's correct.

*Id.* at 19-21 and 181.

According to Corporal Bratton, the first tase causes Lambert to fall like "dead weight." *See* Exhibit "E" to Sweeney Decl. at 107. Lambert strikes his head on a hand sanitizer dispenser when he falls to the ground. *See* Exhibit "I" to Sweeney Decl. at 7:32-7:34. Lambert screams for several seconds. *See id.* at 7:33-7:44. Lambert lands on the ground and is surrounded by Corporal Bratton and Officers Clay and Mann. *See* Exhibit "I" to Sweeney Decl. at 7:32-7:38. This is not a public entrance to the hospital. *See* Exhibit "C" to Sweeney Decl. at 66.

After being tased, Lambert begs the officers to stop. *See id.* at 102-103. Officer Mann observes Corporal Bratton and Officer Clay simultaneously tasing Lambert. *See* Exhibit "D" to Sweeney Decl. at 2. Mann does not intervene. *See* Exhibit "D" to Sweeney Decl. at 2. Corporal Bratton and Officer Clay tase Lambert for several seconds while he is on the ground. *See* Exhibit "I" to Sweeney Decl. at 7:33-8:23. Officer Clay admits that Lambert received the full effect of the tasing for approximately 50 seconds. *See* Travis Clay Dep., 10/7/15, (Vol. 2), at 219 attached to Sweeney Decl. as Exhibit "M" (stating that he did not hear noise from the taser until 8:20 on the video).

Lambert attempts to comply with the officers as they ask him to get on his belly, but they continue to tase and yell at him:

| | |
|---|---|
| Bratton: | Roll around. (TASING LAMBERT) |
| Lambert: | No ma'am, no ma'am, no ma'am. |
| Bratton: | On your stomach, on your stomach, on your stomach (TASING LAMBERT) |
| Clay: | Get on your stomach (TASING LAMBERT). |

Exhibit "I" to Sweeney Decl. at 8:30-8:49.

As Lambert writhes in pain, Corporal Bratton continues to threaten him:

| | |
|---|---|
| Lambert: | (Inaudible and moaning). |
| Mann: | Stay down. |
| Bratton: | Stay down. |
| Bratton: | You understand every time you do this, I'm going to pop you. |
| Lambert: | Ok, ok, ok. |
| Bratton: | Stop. |
| Lambert: | Ok. |
| Bratton: | Stay down, stay down. |
| Clay: | Roll back over. |
| Lambert: | (Howling). |
| Bratton: | Turn around. |
| Bratton: | Turn around. |
| Clay: | Get on your belly. |
| Bratton: | Get on your stomach. |
| Clay: | Get on your belly. |
| Clay: | Roll over. |
| Bratton: | Roll over. |
| Mann: | Roll over. |
| Lambert: | (Inaudible). |
| Bratton: | Roll over. |
| Mann: | Roll over. |
| Clay: | Get on your belly. |
| Lambert: | Ok. |
| Bratton: | I'm going to light you up again, roll over. |
| Bratton: | Roll over. |
| Lambert: | You said roll over. |
| Bratton: | Roll over. |
| Lambert: | Ok. |
| Mann: | (Inaudible) |
| Mann: | Roll over, get on your belly. |
| Bratton: | Get on your stomach. |
| Mann: | Get on your belly. |
| Bratton: | Get on your stomach. |
| Lambert: | Ok. |
| Clay: | Get on your stomach. |
| Lambert: | Ok. I am. I'm trying to get on my stomach right now. |
| Bratton: | Roll around, get on your stomach. Roll around. |
| Lambert: | I'm trying. I'm trying right here. |

Bratton: Roll around.
Lambert: I'm trying here.
Bratton: Roll around.
Lambert: I can't do it.
Bratton: Roll around.
Lambert: (Inaudible).

*Id.* at 7:41-8:51.

Clay proceeds to grab Lambert's leg off the ground and place Lambert in a pain compliance move to force Lambert on his stomach. *See id.* at 9:05-9:11. All three officers then proceed to go "hands on" with Lambert and flip him on his stomach. *See id.* at 9:11-9:14. Bratton and Clay drive stun Lambert for not rolling on his belly. *See id.* at 8:41-9:18. During the time period that the officers are placing the shackles on Lambert, Officer Bratton drive stuns Lambert. *See id.* at 9:22-9:26. Lambert moans in pain as the three officers shackle his legs. *See id.* at 9:15-9:51.

**E. The Officers Continue to Inflict Pain on Lambert While He Is Seated on the Ground**

Lambert begs for the officers to stop, but they continue to tase and yell at him:

Lambert: Ok stop. Stop. I will.
(BRATTTON CONTINUES TO TASE LAMBERT).
Lambert: Stop. Stop. I will.
Mann: Get on your stomach.
Lambert: I didn't do nothing. I didn't do nothing.
Clay: (Grabbing Lambert's foot) Get on your stomach.
Lambert: No, sir. No, sir. No sir.
Bratton: (Grabbing Lambert) Roll around.
Lambert: No, sir.
(All three officers grab Lambert)
Lambert: No, sir.
Lambert: (Moaning).
Clay: Son of a bitch.
Lambert: (Moaning).
Clay: I got the shackles on him.
Lambert: (Moaning).
Bratton: All right.
(The officers tase Lambert)
Clay: I got the shackles on.

Bratton: Stop. Stop. Or, I'm going to hit you again.
Lambert: (Inaudible)
Lambert: I just did cocaine man. I just did cocaine.
Bratton: (Inaudible)
Bratton: You're under arrest.

*See* Exhibit "I" to Sweeney Decl. at 8:51-10:03.

A screen capture from the video of Officer Clay's front dashboard camera depicts an unarmed, handcuffed and shackled Lambert completely surrounded by three uniformed officers:

Exhibit "I" to Sweeney Decl. at 10:30.

Mann then pushes Lambert to the ground and rips 2 taser prongs from Lambert's body. *See id.* at 10:59-11:07. Clay then states, "I shot him too." *Id.* at 11:11-11:12. Mann then proceeds to rip out two (2) more taser prongs as Lambert repeatedly states "please don't do it". *Id.* at 11:16-11:40.

### F. The Officers Reject Lambert's Pleas for Mercy

As this occurs, a handcuffed, shackled and unarmed Lambert continues to beg for the officers to stop as he his seated on the ground:

| | |
|---|---|
| Lambert: | Why y'all trying to kill me man? (Inaudible). I didn't do nothing but some cocaine. |
| Bratton: | All right. You're under arrest, alright. |
| Lambert: | (Inaudible). My momma (inaudible). Please don't do this to me. Please don't do this to me. Please don't do this to me. Please don't do this to me. (Inaudible). |
| Bratton: | (Inaudible) |
| Lambert: | Please officer. |
| Lambert: | (Inaudible). |
| Bratton: | You got them. |
| Mann: | (Inaudible). |
| Lambert: | Don't do it. Don't do it, please. Please don't do it. |
| Mann: | Lay back down, Lay back down. (Grabbing Lambert with Corporal Bratton). |
| Lambert: | (Inaudible). |
| Mann: | (Ripping prongs from Lambert's body). |
| Clay: | I shot him, too. |
| Lambert: | Don't do it to me baby. Don't do it to me baby. Don't do it to me baby. Don't do it to me baby. |

*See* Exhibit "I" to Sweeney Decl. at 10:26-11:26.

During the entire encounter, Lambert does not attempt to get off the ground. *See id.* at 7:41-10:03. Bratton tases Lambert seven (7) times in probe mode which exposed him to twenty-seven (27) seconds of tasing over the span of approximately one minute. *See* Exhibit "I" to Sweeney Decl. at 7:33-8:23; *see also* Taser Log of Officer Tiffany Bratton attached to Sweeney Decl. as Exhibit "N." Officer Clay deploys his taser on Mr. Lambert twice in less than one minute. *See* Exhibit "I" to Sweeney Decl. at 7:33-8:23; *see also* Taser Log of Officer Travis Clay attached to Sweeney Decl. as Exhibit "O." Lambert continues to beg for mercy. *See id.* at 11:40-11:59. As the officers lift Lambert up, Officer Bratton places him under arrest:

| | |
|---|---|
| Bratton: | Mr. Lambert you're under arrest. Stand up. |
| Lambert: | Don't do it please. Don't do it. Don't do it. Don't do it. Please don't do it. Please don't do it. |

Exhibit "I" to Sweeney Decl. at 11:37-12:05.

Bratton and Clay then pull Lambert up from the ground and drag him across the parking lot to the police cruiser. *See id.* at 11:40-11:59. The officers place Lambert in the rear of the police cruiser head first. *See id.* at 13:04-13:10. As an officer closes the door to the cruiser, Lambert once again states, “I did some cocaine.” Exhibit “J” to Sweeney Decl. at 13:14-13:17. Clay asks, “Drive home or wait on y’all?” *Id.* at 14:36-14:38.

### G. The Officers Inflict Punishment on an Unarmed, Defenseless, Handcuffed and Shackled Lambert

Lambert leans to the passenger rear door and says, “Help me. Help me. Help me.” *Id.* at 16:44-16:47. The officers provide no help. *See id.* Instead, Corporal Bratton threatens Lambert, “Don’t do it, don’t do it. I’m going to light your ass up. Don’t do it.” *Id.* at 17:32-17:34. While Lambert is in the rear of the police cruiser, the officers continue to yell at Lambert:

> Bratton: Put ‘em back. Put ‘em back. Put your feet down.
> Mann: Put ‘em down on the ground.
> Bratton: Sit up straight and act like you’ve got some sense.
> Mann: Put your feet down. Put your feet down. Put your feet down on the ground. Put your feet down! Down. Put your feet down.

*Id.* at 17:30-18:00.

Mann then opens the door to the car and tells Lambert, “Sit up, sit up. Do it now. Do it now. Do it.” *Id.* at 18:00-18:08. Corporal Bratton and Officer Mann then simultaneously tase Lambert. *See id.* at 18:07-18:14. Mann and Bratton repeatedly threaten to tase Lambert again unless he sits up. *Id.* at 18:19-18:46. The following dialogue occurs:

> Mann: Sit up!
> Bratton: Put your feet down!
> Mann: Sit up. Do it now! Do it now!
> Lambert: I can’t get up.
> Mann: Do it.
> Lambert: Ah, I can’t move.

*Id.* at 18:00-18:12.

The officers then taze Lambert twice and the video depicts the following:

> Lambert: (As he is being tazed and slides to rear driver’s side door) Aargh!
> Bratton: Get your ass up and act like you’ve got some sense.
> Mann: Get up! Get up!
> Lambert: (Inaudible)
> Mann: Sit up. Sit up. Get up in the seat. (Inaudible) Sit up or I’m going to taze you again.

Bratton: Sit up. (Laughter) Get up.
Mann: Sit up or you'll be tased again. Sit up in the seat.
Bratton: Put your back up. Sit up. Sit up. Sit up. Sit up.

*Id.* at 18:12-18:49.

The officers tase Lambert again. *Id.* at 18:52-19:07. Lambert states, "I didn't do anything man." *Id.* The officers then taze Lambert again and the following dialogue occurs:

Mann: Sit up. Hey, sit up dude.
Lambert: (Inaudible)
Mann: Don't move.
Bratton: Did he bite you?
Clay: He was trying to.
Bratton: He was trying to bite you, alright. Like a dog.
Clay: Y'all ready. Hey y'all could you take a picture of the glass for the car?

*Id.* at 19:18-20:44.

Mann then grabs Lambert by his neck and pushes him toward the passenger side of the vehicle. *See id.* at 19:19-19:25. Clay opens the passenger side door and places Lambert in a pain compliance maneuver while Mann placed the car seat belt on Lambert. *See id.* at 19:30-19:55.

**H. Instead of Getting Him Medical Assistance, Officer Mann Mocks and Laughs at Lambert**

Officer Mann laughs at and mocks Linwood Lambert:

Mann: Damn he's bloody as a hog.
Bratton: I know.
Clay: Y'all ready?
Bratton: Yeah. (Inaudible).
Mann: (Laughing) Huh. Huh, Jesus.
Mann: He is fucked up.
Hospital employee: Y'all bringing him here?
Mann: We were.(Laughter). Ha. Ha. Now he's going to jail. (Laughter).
Hospital employee: Damn. What the hell's wrong with him?
Mann: He did some cocaine.

*See* Mann Dash Cam Video at 1:58-2:30 attached to Sweeney Decl. as Exhibit "P".

Officer Clay asks Officer Mann to take a picture of the window "for Court." *See* Exhibit "J" to Sweeney Decl. at 20:40-20:44. Officer Mann takes the following photograph:

Sweeney Decl. attached as Exhibit "Q."

According to Corporal Bratton, the only medical attention Lambert required was a "band aid." Sweeney Decl. Exhibit "E" at 157-158. Mann also testifies that the only medical attention Lambert required was a "band aid." Sweeney Decl. Exhibit "H" at 75. According to Clay, Bratton decides not to obtain medical attention for Lambert prior to leaving the hospital grounds. *See* Sweeney Decl. Exhibit "C" at 12.

Approximately twenty (20) minutes elapsed from when the Officers first tase Lambert and they left the hospital to transport him to jail. *See id.* at 12. The officers leave the hospital without brining Lambert inside of the hospital for medical treatment. *See* Exhibit "J" to

Sweeney Decl. at 21:14-21:24. Clay leaves the hospital with Lambert at approximately 5:26 a.m. *See id.* at 21:14-21:24. Clay drives Lambert to Blue Ridge Jail. *See id*. at 21:24-27:25. It takes Clay approximately six (6) minutes to reach the jail. *See id*. at 21:24-27:25. Lambert does not move in the car during the ride to jail. *See id*. at 21:24-27:25.

When Clay pulls into the jail, he states, "Oh shit!" *Id.* at 28:19-28:21. Clay then opens the door and checks Lambert's pulse. *See id*. at 29:39-29:42. Officer Clay says, "I can't feel no pulse." *Id*. at 29:39-29:42. The officers call for paramedics. *See id*. at 29:02-29:15 The officers perform CPR. *See id*. at 31:27. Paramedics return to the hospital where Linwood Lambert is pronounced dead. *See* Medical Records from Halifax Regional Hospital attached Sweeney Decl. as Exhibit "R."

### I. The Internal Taser Computer Logs Catalogue Twenty (20) Tasings Totaling Eighty-Seven (87) Seconds

Collectively, Mann, Bratton and Clay tase Lambert twenty (20) times for eighty-seven (87) seconds though he was unarmed, handcuffed (and later shackled, confined to the rear of a police cruiser). *See* Exhibits "N" and "O" to Sweeney Decl. and Taser Log of Officer Clinton Mann attached to Sweeney Decl. as Exhibit "S." Officer Bratton tased Linwood Lambert 15 times for a combined 66 seconds over the course of 9 minutes. *See* Sweeney Decl. Exhibit "N." Corporal Bratton's taser usage on May 4, 2013 is depicted in the following chart:

| Number of uses | Length of use | Real time | Lapse of time since last use |
|---|---|---|---|
| 1 | 2 secs | 5:15:04 | n/a |
| 2 | 5 secs | 5:15:10 | 4 seconds |
| 3 | 5 secs | 5:15:18 | 3 seconds |
| 4 | 3 secs | 5:15:24 | 1 second |
| 5 | 2 secs | 5:15:25 | No lapse |
| 6 | 5 secs | 5:15:34 | 7 seconds |
| 7 | 5 secs | 5:15:53 | 14 seconds |
| 8 | 6 secs | 5:16:22 | 24 seconds |
| 9 | 5 secs | 5:16:28 | No lapse |
| 10 | 10 secs | 5:16:56 | 23 seconds |

| | | | |
|---|---|---|---|
| 11 | 3 secs | 5:16:59 | No lapse |
| 12 | 4 secs | 5:25:43 | 8 min 44 seconds |
| 13 | 5 secs | 5:26:24 | 37 seconds |
| 14 | 1 secs | 5:26:25 | No lapse |
| 15 | 5 secs | 5:26:37 | 11 seconds |

*Id*.

Corporal Bratton, who tased Lambert for 66 seconds, considers every member of this community a threat to cause her harm, “regardless of the circumstances”. *See* Exhibit “E” to Sweeney Decl. at 95. Officer Bratton admits that exposing Lambert to a combined 15 seconds of tasing in probe mode in less than one (1) minute would be excessive force under the circumstances. *See id*. at 124.

Officer Clay testifies that he deployed the taser in probe mode on two occasions and once in drive stun mode. *See* Exhibit “C” to Sweeney Decl. at 15. Officer Clay admits he deployed his taser on Lambert 3 times for approximately 12-13 seconds over the span of 1 minute. *See id.* at 15, 133, 155; *see also* Taser Log of Officer Travis Clay attached to Sweeney Decl. as Exhibit “O.” Officer Clay’s taser usage on May 4, 2013 is depicted in the following chart:

| Number of uses | Length of use | Real time | Lapse of time since last use |
|---|---|---|---|
| 1 | 5 secs | 5:43:20 | n/a |
| 2 | 3 secs | 5:44:02 | 37 secs |
| 3 | 5 secs | 5:44:35 | 30 secs |

Exhibit “L” to Sweeney Decl.

Officer Mann tased Linwood Lambert twice for 8 seconds as depicted in the following chart:

| Number of uses | Length of use | Real time | Lapse of time since last use |
|---|---|---|---|
| 1 | 3 sec | 5:44:02 | n/a |
| 2 | 5 sec | 5:44:35 | 29 ecs |

*See* Taser Log of Officer Clinton Mann attached to Sweeney Decl. as Exhibit “S”. Officer Mann admits he tased Lambert twice. *See* Exhibit “H” at 18.

### J. South Boston Police Department Policies and Procedures

The SBPD Use of Force policy forbids the use of force, "as a threat to make a person comply with an officer's verbal order when no physical violence is imminent." *See* ADM 112 – Use of Force Policy attached to Sweeney Decl. as Exhibit "T." Corporal Bratton admits that the SBPD Use of Force Policy is mandatory policy. *See* Exhibit "E" to Sweeney Decl. at 111. Corporal Bratton admits she tased Lambert merely for failing to comply with verbal commands. *See id.* at 108. Officer Clay also admits the officers deployed their tasers on Lambert because he was not complying with verbal commands as follows:

> Q. Okay. Did you hear any of your fellow officers tell him to roll over or he would keep getting it?
> A. Yes.
> Q. What does that mean, when you tell an individual "roll over or you're going to keep getting it?"
> A. To comply with the command or you're going to be tased again.
> Q. So it's a threat of tasing, if they don't comply with the verbal command; correct?
> A. Yes.

Exhibit "C" to Sweeney Decl. at 102.

Corporal Bratton admits Lambert never verbally threatened the officers at any point during the entire encounter. *See* Tiffany Bratton Dep., 10/26/15 (Vol. 2), at 16 attached to Sweeney Decl. as Exhibit "U." According to Bratton, Lambert's verbal demeanor "was never aggressive" even when he was being tased. *Id.* at 16.

The SBPD's mandatory Use of Force Policy also states that "the use of the Air Taser is no longer justified once the subject has been restrained or is under control." *See* Exhibit "T" to Sweeney Decl. Officer Clay admits that a handcuffed individual is "restrained." *See* Exhibit "C" to Sweeney Decl. at 121. Officer Mann admits that tasing is not justified if an individual is restrained or under control. *See* Exhibit "H" to Sweeney Decl. at 145. Officer Clay admits that an individual is restrained when they are confined to the back of a police cruiser. *See* Exhibit "C" to Sweeney Decl. at 27. Clay admits that the SBPD Use of Force Policy prohibits the use of tasers when an individual is restrained or under control. *See id.* at 121.

SBPD OPR 211 – Prisoner/Detained Persons Transports policy mandates that officers obtain immediate medical attention for prisoners needing it following the arrest. *See* OPR 211 – Prisoner/Detained Persons Transports attached to Sweeney Decl. as Exhibit "V." SBPD OPR 211 states in relevant part, "If an officer observes that a person becomes sick or injured after an arrest, the arresting/transporting officer will immediately obtain medical attention for the prisoner." *See id*.

Corporal Bratton admits this policy is mandatory and officers do not have discretion to violate it. *See* Exhibit "E" to Sweeney Decl. at 51. Mann also admits ADM – 112, Use of Force and OPR 211, Prisoner/Detained Persons Transports are mandatory policies which the officers must follow. *See* Exhibit "H" to Sweeney Decl. at 135, 138.

### K. Taser Warnings and Instructions

TASER Handheld ECD instructions (Version 18 – Released January 2012) states that exposure to 15 seconds of tasing (continuous or cumulative) increases the risk of death. *See* TASER Handheld ECD instructions (Version 18 – Released January 2012) at 4 attached to Sweeney Decl. as Exhibit "W." Bratton, Mann and Clay admit that they had obligation to know, understand and follow all of TASER's warnings and instructions which were in effect on May 4, 2013. *See* Exhibit "C" to Sweeney Decl. at 66; *see also* Exhibit "E" to Sweeney Decl. at 17-18; Exhibit "H" to Sweeney Decl. at 19, 24.

Despite the fact that they had taken Lambert to the hospital for a medical evaluation pursuant to an ECO and that they tased him twenty (20) times, the officers determined that he did not require medical attention. *See* Exhibit "C" to Sweeney Decl. at 50; *see also* Exhibit "H" to Sweeney Decl. at 73 and Exhibit "Q." Bratton admits that she disregards the TASER warnings as follows:

> Q. Okay. Now, TASER warns the users that certain types of individuals are more susceptible to than others to being tased, correct?
>
> A. Yes. There are eight pages of warnings, and basically if I read and abided by every single warning, I would not tase anyone. So, yes, it does, but these are so generalized that every single person I come in contact with I would never tase, based on these warnings.

*See* Exhibit "U" to Sweeney Decl. at 30.

The TASER warnings and instructions which were in effect on May 4, 2013 state that a person may get hurt or die due to the effects of the CEW [the taser]. *See* Exhibit "W" to Sweeney Decl. at 2; *see also* TASER Handheld CEW Warnings, Instructions and Information: Law Enforcement attached to Sweeney Decl. Exhibit "X" at 1. The TASER warnings and instructions which were in effect on May 4, 2013 warned Bratton, Mann and Clay to "read, understand, and follow all current instructions, warnings, and relevant TASER training materials before using TASER CEW. Failure to do so could increase the risk of death or serious injury to the user, force recipient, or others." *See* Exhibit "W" at 2; *see also* Exhibit "X" to Sweeney Decl. at 1.

The Police Executive Research Forum, Community Oriented Policing Services, United States Department of Justice, and International Association of Police Chiefs identified 15 seconds of taser exposure as "a significant safety point." *See* Exhibit "CC" to Sweeney Decl. at 3. Prior to May 4, 2013, TASER warnings stated that any taser exposure could kill an agitated or intoxicated individual. *See* Exhibit "W" to Sweeney Decl. at 2.

TASER warnings and instructions which were in effect on May 4, 2013 warned of the need to: (1) minimize the number and duration of taser exposures; and (2) to avoid simultaneous tasing because of the cumulative effect of the tasing and the increased risk to the individual being tased. *See* Exhibit “W” to Sweeney Decl. at 2. Officer Clay admits that he was aware that TASER had a warning that individuals that were under the influence of drugs were at an increased risk of serious injury and death when tased. *See* Exhibit “C” to Sweeney Decl. at 42.

Officer Mann also admits that he was aware that an individual under the influence of drugs is at an increased risk of death or serious injury if tased. *See* Exhibit “H” to Sweeney Decl. at 90. Officer Clay admits that he reviewed and was familiar with all current warnings and instructions provided by TASER, including the law enforcement handout and PowerPoint presentation. *See* Exhibit “C” at 148-149; *see also* Exhibits “W” and “X” to Sweeney Decl.

Clay admits that prior to May 4, 2013, he was aware that TASER: (1) cautioned against usage of the weapon in excess of 15 seconds; (2) warned that individuals who are under the influence of drugs or alcohol are particularly susceptible to death or serious injury; (3) warned that individuals that are profoundly agitated are particularly susceptible to death or serious injury; (4) warned that simultaneous or cumulative exposures could cause serious injury or death; (5) warned against tasing handcuffed individuals. *See* Exhibit “C” to Sweeney Decl. at 150 and 156.

Before tasing Lambert, Bratton, Mann and Clay, the officers did not consider alternative uses of force even though three officers were present and Lambert was unarmed and restrained. *See id.* at 105-106. Before leaving the Super 8 motel Clay observed that Lambert was: (1) sweating profusely; (2) had a white substance coming from his nose; (3) hallucinating; and (4) paranoid. *See id.* at 21-22.

Officer Clay admits that he was aware that Mr. Lambert’s physical and mental status placed him at an increased risk of serious injury or arrest related death if taser weapons were used on Mr. Lambert. *See id.* at 135-137. Before leaving the hospital for the jail, the officers never: (1) checked Lambert's vital signs; (2) asked him if he was in pain; (3) asked him if he was having difficulty breathing; or (4) asked him if he was dizzy. *See* Exhibit "E" to Sweeney Decl. at 161.

### L. Corporal Bratton, Officer Clay and Officer Mann's Multiple and Conflicting Accounts of the Events of May 4, 2013.

Corporal Tiffany Bratton, Officer Travis Clay, and Officer Clinton Mann provide multiple inconsistent accounts of the events which transpired on May 4, 2013. The specific events and the various versions are itemized below.

#### 1. Corporal Bratton's Untrue Version of the Events

In her Statement to the Virginia State Police, Corporal Bratton describes how exiting the vehicle at the hospital as, "I opened the door and got Lambert's feet down to the ground. Instantly Lambert pushed past us and started to run. He ran shoulder first into the E.R. sliding glass doors causing the door frame to bend." Tiffany Bratton Statement to the Virginia State Police 5/4/13 at 4 attached to Sweeney Decl. as Exhibit "F." This account differs completely from this video evidence and Officer Mann's account. *Cf.* Exhibit "J" at 6:40-7:26 and Statement of Clinton Mann to the Virginia State Police, 5/8/13 at 2 attached to Sweeney Decl. as Exhibit "Y." Officer Mann writes, "[T]he door was open and he comes out head first and fell to the ground. Being very sweaty he slipped by…"

Corporal Bratton also provides a false account of her first deployment of her taser in front of the Emergency Room Doors when, "I deployed my taser and Lambert fell to the ground. After five seconds Lambert sprung to his feet." Exhibit "F" at 4-5; *see also* Tiffany Bratton South Boston Police Department Statement, 5/4/13 at 4 attached to Sweeney Decl. at Exhibit "Z." ("Lambert got up"). At no time does the video depict Linwood Lambert "springing to his feet." *Cf.* Exhibit "I" Clay Dashboard Camera (Front View) at 7:32-7:37 (documenting Bratton and Clay tasing Lambert while he remains on the ground).

Later, Corporal Bratton repeats this falsehood when describing Officer Clay's first probe deployment and her second probe deployment when she writes, "Officer Clay then deployed his taser. Lambert again fell to the ground but instantly sprung back up. I deployed an additional 5 seconds from my taser." Exhibit "Y" at 5. This statement is also contradicted by the video evidence. *Cf.* Exhibit "I" at 7:32-8:33 (documenting Bratton and Clay tasing Lambert in probe mode a combined nine (9) times over the course of approximately one minute while Lambert remained on the ground).

Bratton further describes Officer Clay's second probe deployment and writes, "Lambert fell again but got back up. Officer Clay dispersed another 5 second round and Lambert fell and started to roll around." Exhibit "F" at 5. At no time during the video does it depict Linwood Lambert ever getting up off of the ground.

Bratton also claims that Lambert refused to get up off of the ground and states, "Linwood refused to walk back to Officer Clay's car. We were forced to drag him to the car." Exhibit "Y" to Sweeney Decl. at 4. Once again, the front view of Officer Clay's dashboard camera casts doubt on this claim and confirms Lambert did not refuse to get up and his attempt to walk back to the police car while handcuffed and shackled. Exhibit "I" at 11:42-12:00.

In her statement to the South Boston Police, Corporal Bratton claims, "I repeatedly gave him commands to sit up in the car so we could put his seat belt on. He stated he was not going to sit up. I drive stunned him in an effort to get him to sit up." Exhibit "AA" at 4. The rear view of Officer Clay's dashboard camera confirms that Linwood Lambert did not state that he was not going to sit up. *Cf.* Exhibit "J" at 18:00-19:07.

In perhaps the most glaring falsehood told by Corporal Bratton, on October 4, 2013, Bratton tells the Virginia State Police:

BRATTON stated the subject was lying on his back and she went to dry stun him and the guy grabbed the end of the Taser and was pulling it and she must have been pulling the trigger with the Taser discharging with no contact being made with the subject. BRATTON stated this probably happened several times.

Statement of Tiffany Bratton to the Virginia State Police 10/4/13 attached to Sweeney Decl. as Exhibit "AA."

At no time during the entire police encounter did "the guy grab[] the end of the taser and was pulling it." *Cf*. Exhibit "I" at 7:32-8:33. Even the most cursory review of the videotaped evidence confirms that it was physically impossible for Linwood Lambert to "grab" the end of Corporal Bratton's taser weapon while his hands were cuffed behind his back.

**2. Officer Mann's Untrue Version of Events**

In his statement to the Virginia State Police, Officer Mann claims, "Clay and Bratton deployed tasers, both hit the subject and he fell down. When he fell he knocked over a soap dispenser. He jumped up and one tased him again." Exhibit "Y" at 2. Yet, the front view of Officer Clay's dashboard camera confirms that Lambert did not "jump up" because Lambert never got back up on his feet on his own. Exhibit "I" to Sweeney Decl. at 7:32-8:33.

Officer Mann also represents to the Virginia State Police, "We tried to roll him over on his stomach and he drawed (sic) back his legs and tried to kick. The subject was tased again for being uncompliant." Exhibit "Y" at 2. The video evidence establishes that Lambert did not attempt to kick the officers. Exhibit "I" at 7:33-9:05.

Further, Officer Mann falsely represents to the Virginia State Police that, "Officer Clay was able to get one leg and I got him around his shoulders and flipped him. Officer Bratton and I held him while Clay put the leg irons on. He was kicking and trying to get away." Exhibit "Y" to Sweeney Decl. at 2. The video evidence casts doubt on Officer Mann's claim because it shows that Lambert did not attempt to fight back or try to get away. Exhibit "I" at 9:06-10:00.

### 3. Officer Clay's Versions of the Events

According to Officer Clay, when Lambert exited the vehicle he yelled, "I want to go to the emergency room" as he made his way to the doors of the emergency room. Exhibit "L" at 2. After Lambert ran "into the sliding glass doors, he then backed up into the corner where they all cornered him." *Id.* The officers did not warn Lambert before tasing him. *See id.* Clay tasered Lambert in probe more for five seconds and he claimed, "when the five seconds were up the man started fighting again." Once again, the front view of Officer Clay's own dashboard camera casts doubt on his claim that Lambert "started fighting" again after five sections. *Cf.* Exhibit "I" at 7:32-7:38.

Though Officer Clay claimed to the Virginia State Police that he, "[D]id not know when Bratton tried to taser the man," Clay admitted in his statement to the SBPD he simultaneously tased Lambert with Corporal Bratton. *Cf.* Exhibit "L" to Sweeney Decl. at 2 and Exhibit "B" at 6. Officer Clay states, "I aimed my taser at his belt buckle and deployment my taser. Linwood went down and hit his head on the wall next to the sliding glass doors. This was when I noticed that Bratton had also deployed her taser." Exhibit "B" to Sweeney Decl. at 6.

## III. ARGUMENT

### C. Summary Judgment Standard

"Summary judgment is appropriate only when there is not genuine dispute regarding any material fact, and the moving party is entitled to judgment as a matter of law." *See Meyers v. Balt. County*, 713 F.3d 723, 730 ($4^{th}$ Cir. 2013). Summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

"When considering a request [by way of summary judgment motion] for qualified immunity, the court considers the facts in the light most favorable to the party opposing granting judgment based on qualified immunity." *Scott v. Harris*, 550 U.S. 372, 378 (2007). "When faced with a motion seeking summary judgment based on qualified immunity, a court must decide whether, viewing the facts in the light most favorable to the plaintiffs, the defendant should prevail based as a matter of law on the asserted qualified immunity." *Id.* "When there is a conflict as to material aspects of what occurred, 'this [factual conflict] usually means adopting…the plaintiff's version of the facts.'" *Id.* Summary judgment on the issue of qualified immunity is only appropriate "if a genuine issue of material fact does not exist as to the actions taken by the officer." *Bostic v. Rodriguez*, 667 F.Supp.2d 591, 607-608 (E.D.N.C. 2009).

### D. Plaintiff's Fourteenth Amendment Excessive Force Claims Must Survive Because Defendants Waived Any Claim to Qualified Immunity

Qualified immunity is, "an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). "Since qualified immunity is a defense, the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (U.S. 1980). The party seeking qualified immunity must set forth the basis for it. *Id.* at 640-641. Failure to articulate the factual basis for it constitutes waiver. *See Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997)(holding a claim of qualified immunity can be waived if not squarely presented to the district court); *see also Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986). By failing to raise the defense of qualified immunity to Plaintiff's Fourteenth Amendment claims regarding Defendants' post-arrest excessive and unreasonable use of force, Defendants have waived that defense. *Sales v. Grant*, 224 F.3d 293, 296-297 (4th Cir.

2000)(finding defendant waived the right to assert qualified immunity, where he "only cursorily references qualified immunity in his answer to a section 1983 complaint, and thereafter fails to mention, let alone seriously press, his assertion of that affirmative defense" in dispositive motions).

Under the Court's scheduling order, Defendants were required to articulate a basis for their claim of qualified immunity on Plaintiff's Fourteenth Amendment excessive force claims by December 16, 2015. They did not. Though they seek qualified immunity on Plaintiff's Fourth Amendment claims, their Motion for Summary Judgment is devoid of any analysis under the Fourteenth Amendment regarding their conduct after they placed Linwood Lambert under arrest. The party seeking qualified immunity cannot rely on the trial court to consider *sua sponte* abandoned defenses after a motion for summary judgment is filed. *See Buffington v. Baltimore Co.*, 913 F.2d 113, 120-22 (4th Cir. 1990)(refusing to consider *sua sponte* a defense of qualified immunity in a § 1983 action).

**C. Qualified Immunity Analysis in Excessive Force Cases**

The analysis of an excessive force claim brought under § 1983 begins with "identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989). Courts analyze claims of excessive force under the Fourth Amendment's "objective reasonableness standard." *Orem*, 523 F.3d at 446. Fourth Amendment protections, however, do not extend to individuals after arrest. *Id*. (citing *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997)(en banc)). In *Riley*, the Fourth Circuit held, "[t]he Fourth Amendment [only] governs claims of excessive force during the course of an arrest, investigatory stop, or other 'seizure' of a person." *Riley*, 115 F.3d at 1161.

"[E]xcessive force claims of a pretrial detainee [or arrestee] are governed by the Due Process Clause of the Fourteenth Amendment." *Young v. Prince George's County, Maryland*, 355 F.3d 751, 758 (4th Cir. 2004) (quoting *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998)). To succeed on an excessive force claim under the Due Process Clause of the Fourteenth Amendment, Lambert must establish after arrest the officers "inflicted unnecessary and wanton pain and suffering." *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998) (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). "In determining whether [this] constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted, and whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Orem*, 523 F.3d at 446 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

As the Fourth Circuit has recognized, the point at which Fourth Amendment protections end and Fourteenth Amendment protections begin is often "murky." *Orem*, 523 F.3d at 446. Because officers, Clay, Mann and Bratton utilized excessive force both before and after placing Linwood Lambert under arrest, the qualified immunity analysis occurs under both the Fourth and Fourteenth Amendments.

The application of the qualified immunity doctrine requires a two-prong analysis. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001). A court must determine whether the facts shown, "taken in the light most favorable to the plaintiff, establish that the police officer's actions: (1) violated a constitutional right; and (2) that right was 'clearly established' at the time of the challenged conduct." *Id*. "The burden of proof and persuasion with respect to a defense of qualified immunity rests on the official asserting the defense." *Meyers*, 713 F.3d at 731 (citing *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th Cir. 2003)).

### D. The Officers' Pre-Arrest Use of Force in Front of the Hospital Was Unreasonable and Excessive In Violation of the Fourth Amendment

Under the Supreme Court's holding in *Graham v. Connor*, the Fourth Amendment prohibits police officers from using force which is "excessive" or not "reasonable" in the course of making an arrest. 490 U.S. 386, 395 (1989). The "excessive force" analysis is based on a standard of "objective reasonableness" in examining an officer's conduct in effectuating an arrest taking into account "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396, 399; *see also Myers*, 713 F.3d at 732-33. Other factors to consider are "the threat reasonably perceived by the officer" and "the security problem at issue". *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). When determining the reasonableness of an officer's conduct, the officer's subjective interpretation is irrelevant and the court must determine "the understanding that a reasonably informed police officer should have had of it." *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988)[2]. The reasonableness inquiry charges the officer "with possession all the information reasonably discoverable by an officer acting reasonably under the circumstances." *Id.* at n. 4. The "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Thomas v. Holley*, 533 Fed. Appx. 208, 215 (4th 2013)(citing *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005)). The subjective intent or motivation of the officer is irrelevant. *See Graham*, 490 U.S. at 397.

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[2] In their Memorandum of Law, the Defendants incorrectly quote *Sevigny* when they state that "the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question." Defts' Mem. of Law at 19.

### 1. The Initial Tasings Which Caused Lambert to Fall Were Unreasonable and Excessive

In *Myers*, the Fourth Circuit found that an officer's first three deployments of his taser on an individual who was acting erratically and holding a weapon (a baseball bat) did not amount to an unreasonable or excessive use of force. *Myers*, 713 F.3d at 732-33. Here, when the officers placed Lambert's hands in cuffs at the hotel, he was not under arrest. *See* Exhibit "G" to Sweeney Decl. at 4:54:35-4:55:40; *see also* Exhibit "C" to Sweeney Decl. at 74. For the remainder of his life, Lambert remained handcuffed. The Officers took Lambert to the hospital under an ECO. Exhibit "C" to Sweeney Decl. at 13. When Lambert runs into the hospital doors, his is restrained and surrounded by all three officers. *See* Exhibit "I" to Sweeney Decl. at 7:28-7:31. Officer Clay admits that he tased an unarmed and restrained man as follows:

> Q. Now, at the time that Mr. Lambert was first tased by you, he was running away; correct?
> A. At this time, no. He – he had run away and ran – ran against the sliding door, and he had turned around, and that's when I deployed my taser.
> Q. Okay. His hands were restrained, correct?
> A. That's correct.
> Q. And actually before you left the Super 8 Motel, you searched him to make sure he didn't have any weapons; correct?
>
> * * * *
>
> A. That is correct.
> Q. So you would agree with me that he was also unarmed?
> A. That's correct.

Exhibit "C" to Sweeney Decl. at 19-21, 181.

SBPD's mandatory Use of Force Policy specifically prohibits "the use of the Air Taser is no longer justified once the subject has been restrained or is under control." Sweeney Decl. Exhibit "T." Officer Mann admits tasing is not justified if an individual is restrained or under control. *See* Exhibit "H" to Sweeney Decl. at 145. Here, Lambert is restrained and surrounded.

Yet, Corporal Bratton and Officer Clay simultaneously tase Lambert for several seconds. *See* Exhibit "C" to Sweeney Decl. at 19-21, 181. According to Officer Bratton the first tase caused Lambert to fall like "dead weight." *See* Exhibit "E" to Sweeney Decl. at 107. As confirmed by the taser's internal computer records and video evidence, Corporal Bratton used her taser on Lambert in probe mode seven (7) times which exposed him to twenty-seven (27) seconds of shock over the span of approximately one minute. *See* Exhibit "T" to Sweeney Decl. at 7:33-8:23; *see also* Taser Log of Officer Tiffany Bratton attached to Sweeney Decl. as Exhibit "N."

Officer Bratton admits that exposing Lambert to a combined fifteen (15) seconds of tasing in probe mode in less than one (1) minute would be excessive force under the circumstances. *See* Exhibit "E" to Sweeney Decl. at 124. As confirmed by the taser's internal computer records and video evidence, Officer Clay deployed his taser on Mr. Lambert on two occasions in less than one (1) minute for eight (8) seconds. *See* Exhibit "O" to Sweeney Decl. The tasing caused Lambert to fall to the ground and scream in pain. *See* Exhibit "I" to Sweeney Decl. at 7:32-7:34.

Unlike *Myers*, when the officers tase Lambert, he is unarmed, his hands were cuffed and was totally surrounded by them. None of the elements justifying the force of the initial deployments in *Myers* are present to justify Corporal Bratton and Officer Mann's initial tasings. Lambert was not resisting arrest, as in *Myers*, because Lambert was not under arrest or in the process of being arrested when he was taken to the hospital. Even if he was being arrested for breaking the window of the police car, the level of force was disproportionate to any misdemeanor to which the officers could have charged Lambert. None of the circumstances permitted Officer Clay and Corporal Bratton to disregard and violate SBPD policy and tase a handcuffed person. When the officers tased Lambert, he was surrounded and (previously) restrained. He was not holding a baseball bat, his hands were not free and he had not moved toward the officers. Accordingly, Corporal Bratton and Officer Mann's initial tasings were objectively unreasonable and violated Lambert's Fourth Amendment rights.

Plaintiff's police practices expert, Melvin Tucker, will opine at the time of trial that Defendants "were plainly incompetent or they knowingly violated clearly established law enforcement training": (1) by treating this as a control and arrest situation instead of a medical emergency; (2) through their use of physical force and the proper use of a taser; and (3) the manner in which the officers used the tasers was "unreasonable and contrary" to well established training and standards, TASER's own warnings and instructions, and was a level of force that was greater than what a reasonable officer under the same or similar circumstances would have used. *See* Affidavit of Melvin Tucker attached to Sweeney Decl. as Exhibit "CC."

The SBPD's lead TASER instructor, Sgt. Greg Gilliam admits that: (1) prior to May 4, 2013, he taught members of the SBPD about excited delirium during TASER training; (2) the officers he trained had an obligation to know, understand, and abide by all of TASER's warnings and instructions contained in TASER's PowerPoint Presentation Version 18 (January 2012) and TASER's Handheld CEW Warnings, Instructions, and Information: Law Enforcement (March 1, 2013); and (3) members at the SBPD had an obligation to independently remain current on TASER's warnings and instructions. *See* Greg Gilliam Dep., 11/18/15, attached to Sweeney Decl. as Exhibit "EE" at 10, 16-17. Gilliam admits Lambert was restrained when he was: (1) handcuffed; (2) handcuffed and shackled; and (3) handcuffed, shackled and surrounded. *See id.* at 36-37. Gilliam admits that the officers surround Lambert in front of the emergency room. *See id.* at 37. Gilliam admits that tasering a handcuffed and unarmed suspect for 10 seconds is unreasonable. *See id.* at 38. Gilliam admits that the officers had alternative methods of force at their disposal when confronting a handcuffed and unarmed suspect. *See id.* at 50. The alternative methods of force were pepper spray, batons and "hands-on." *See id.* at 50-51.

### 2. The Officers' Repeated and Multiple Tasings of Lambert While He Was on the Ground Are Worse than the Ones the Fourth Circuit Condemned In *Meyers*

The Defendants have incorrectly cited the facts in *Meyers*, omitting several key facts in their analysis. In *Meyers*, the plaintiff was involved in a fist fight with his brother before police arrived that the scene. *See Myers*, 713 F.3d at 727. The 911 operator reported to the officers that a physical altercation had occurred and the operator heard "screaming in the background." *Id.* When the first officer arrived at the scene he observed that the plaintiff's brother's face was lacerated and swollen. *See id.* The brother notified that officer that the plaintiff was inside the home and the brother "stated that when he arrived at the house that evening, he heard his mother exclaim, 'stop, Ryan. You are hurting me." *Id.* An ensuing fistfight between the brothers caused their mother to call the police. *See id.* The brother also advised the officer that the plaintiff "has problems upstairs and he's bipolar." *Id.* Before entering the home the officer observed that the plaintiff "was pacing inside carrying a baseball bat." *Id.*

At the time the officer first deployed his taser in probe mode (for five (5) seconds), the plaintiff had the bat in his hands. *See id.* at 728. The second deployment (for five seconds) caused the plaintiff to drop his bat, however, he remained standing. *See id.* The third deployment (for five seconds) caused the plaintiff to drop to the ground. *See id.* Then three (3) officers got on the plaintiff's back and proceeded to tase the plaintiff seven (7) more times (one (1) probe and six (6) drive stun). *See id.* While the plaintiff was on the ground, he "stiffened up" his body and moved his legs while the officers sat on his back. *See id.*

In *Meyers*, the Fourth Circuit found that while the officer's first three uses of his taser were permissible, that justification had been eliminated after the victim relinquished the baseball bat and fell to the floor. 713 F.3d at 733. Other officers sat on the victim's back and he was only able to use his legs. Yet, the offending officer continued to use his taser seven more times until he had rendered the victim unconscious. *See id.* at 729. The district court determined that the officer's the seven additional taser shocks were inappropriate, concluding that "the Court cannot say as a matter of law that Officer Mee's actions were objectively reasonable." *Id.* at 733-734 (citing *Meyers v. Balt. County*, 814 F. Supp. 2d 552, 560 (D. Md. 2011)). Fourth Circuit agreed with the district court but went further than its equivocal conclusions and stated:

> [We] state the conclusion affirmatively. It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who is no longer armed, has been brought to the ground, has been restrained physically by several other officers and no longer is actively resisting arrest.

*Id. at* 734.

Unlike this case, in *Meyers*, the plaintiff had a weapon (a baseball bat), had previously engaged in a fist fight, and was not handcuffed. *See id.* Here, Lambert never had a weapon, was not fighting the officers and was always hand cuffed. Officer Clay admits, Mr. Lambert was restrained and the first tase caused him to fall on the ground. Further, three officers had Lambert surrounded in front of the emergency room and he never attempted to get off the ground and flee the scene. Further, Lambert did not actively resist the officers during the tasing. Even after Lambert fell to the ground, the officers continued to shock him.

In *Meyers*, the Fourth Circuit held that "officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity." *Id*. The *Meyers* Court further held that "the fact that the force used in the present case emanated from a taser, rather than from a more traditional device, is not dispositive. The use of **any** 'unnecessary, gratuitous, and disproportionate force,' whether arising from a gun, a baton, a taser or other weapon, precludes an officer from receiving qualified immunity if the subject is unarmed and secured." *Id*. at 734-735 (citing *Park v. Shifflet*, 250 F.3d 843, 852-853 (4th Cir. 2001)(holding that use of pepper spray to subdue an unarmed suspect was irresponsible and excessive when the subject was not a threat to the officer or the public and officer was not entitled to qualified immunity)).

The Fourth Circuit's reasoning in *Meyers* is consistent with holdings from other circuits on taser use. The United States Court of Appeals for the Sixth Circuit has held that tasing of a handcuffed suspect on the ground constitutes excessive force. *See Wells v. City of Dearborn Heights*, 538 Fed. Appx. 631, 638 (6th Cir. 2013). The Sixth Circuit has concluded that, "[I]t is unreasonable to use significant force on a restrained subject *even if some level of passive resistance is presented.*" *Id*. (emphasis in the original). In *Wells*, the Sixth Circuit also found that it is illegal to deploy "non-lethal, temporary incapacitating force, including tasers on a handcuffed suspect who no longer poses a safety threat, flight risk and/or is not resisting arrest." *Id.* (citing *Michaels v. City of Vermillion*, 539 F. Supp. 2d 975, 985 (N.D. Ohio 2008)). "[T]he use of force, including a Taser, on a suspect who has been subdued is unreasonable and a violation of a clearly established right." *Austin v. Redford Twp. Police Dep't*, 690 F.3d 490 (6th Cir. 2012) (holding that the tasing of handcuffed suspect was excessive force when there is no danger of the "potential escape of a dangerous criminal or the immediate threat of harm"); *see also Bultema v. Benzie County*, 146 F. App'x 28, 35-36 (6th Cir. 2005)(holding officers use of pepper spray on a handcuffed suspect constituted excessive force where suspect "continued to struggle and squirm while handcuffed" and suspect was "clearly not a threat to anyone's safety nor…attempting to evade arrest by flight."); *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009)(tasing of an unarmed, nonviolent and nonfleeing misdemeanant for 2-3 seconds in drive stun mode constitutes excessive force); *Casey v. City of Federal Heights*, 509 F.3d 1278, (10th Cir. 2007) ("it is clearly established that force [tasing] is least justified against non-violent misdemeanants who do not flee or actively resist arrest.")

### 3. Corporal Bratton, Officer Mann and Officer Clay's Unnecessary, Gratuitous and Disproportionate Tasing of Linwood Lambert Violated a Clearly Established Constitutional Right

In light of the Fourth Circuit's precedent in *Meyers* addressing the use of force on handcuffed and unarmed individuals, a jury could reasonably conclude that the tasing of Lambert violated a constitutional right so clearly established "that every reasonable official [police officer] would have understood that what he [/she][was] doing violated that right." *Wells*, 538 Fed. Appx. at 638 (6th Cir. 2013)(citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Even if "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005). Though the first tasings which caused Lambert to fall were unreasonable and excessive, because Lambert was handcuffed, surrounded and unarmed, the additional tasings of Lambert while he was on the ground are even more offensive and violate the Fourth Amendment. Though Corporal Bratton admits that exposing Lambert to a combined 15 seconds of tasing in probe mode in less than 1 minute would be excessive force under the circumstances, she deployed her taser seven (7) times on Mr. Lambert in probe mode, exposing him to 27 seconds of tasing over the span of approximately one minute. Exhibit "E" to Sweeney Decl. at 124; *see also* Sweeney Decl. Exhibit "N". As Lambert screams in pain for several seconds, the officers demand that Lambert "get on his belly" while Officer Bratton and Officer Clay continue to tase him. Exhibit "H" to Sweeney Decl. at 8:30-8:49.

SBPD's Use of Force policy forbids, "a threat to make a person comply with an officer's verbal order when no physical violence is imminent." *See* ADM 112 – Use of Force Policy attached to Sweeney Decl. as Exhibit "T." Officer Clay admits to violating this policy. Exhibit "C" to Sweeney Decl. at 102. So does Corporal Bratton. *See* Exhibit "E" to Sweeney Decl. at 108. But the officers' conduct is far more reprehensible than just threatening Lambert in violation of this mandatory policy. Not only do the officers use the threat of force, they actually apply the tase him for merely failing to comply with verbal commands. *Id.* Clay admits that the officers tased Lambert because he was not complying with verbal commands. Exhibit "C" to Sweeney Decl. at 102. Officer Bratton also admits she tased Lambert merely for failing to comply with verbal commands. *See* Exhibit "E" to Sweeney Decl. at 108. Even though Lambert had been exposed to repeated electrocution and physical trauma, the officers continued to tase him for not rolling on his belly. *See* Exhibit "I" to Sweeney Decl. at 8:30-8:49. Officer Bratton, threatens to (and does) "light up" Mr. Lambert. *See id* at 7:41-10:03.

A comparison of the internal computer taser records in *Meyers* to those here further accentuates the unreasonableness of the officers' actions:

*Meyers* Tasings

| # | Mode | Duration | Time elapsed from end of prior use |
|---|---|---|---|
| 1 | Probe | 5 sec. | - |
| 2 | Probe | 5 sec. | 1 sec. |
| 3 | Probe | 5 sec. | 1 sec. |
| 4 | Probe | 5 sec. | 86 sec. |
| 5 | Stun | 4 sec. | 2 sec. |
| 6 | Stun | 2 sec. | 1 sec. |
| 7 | Stun | 2 sec. | 4 sec. |
| 8 | Stun | 3 sec. | 13 sec. |
| 9 | Stun | 2 sec. | 2 sec. |
| 10 | Stun | 2 sec. | 38 sec. |

Bratton's Tasings of Lambert

| Number of uses | Length of use | Lapse of time since last use |
|---|---|---|
| 1 | 2 secs | n/a |
| 2 | 5 secs | 4 seconds |
| 3 | 5 secs | 3 seconds |
| 4 | 3 secs | 1 second |
| 5 | 2 secs | No lapse |
| 6 | 5 secs | 7 seconds |
| 7 | 5 secs | 14 seconds |
| 8 | 6 secs | 24 seconds |
| 9 | 5 secs | No lapse |
| 10 | 10 secs | 23 seconds |
| 11 | 3 secs | No lapse |
| 12 | 4 secs | 8 min 44 seconds |
| 13 | 5 secs | 37 seconds |
| 14 | 1 secs | No lapse |
| 15 | 5 secs | 11 seconds |

Exhibit "N" to Sweeney Decl.

Clay's Tasings of Lambert

| Number of uses | Length of use | Lapse of time since last use |
|---|---|---|
| 1 | 5 secs | n/a |
| 2 | 3 secs | 37 secs |
| 3 | 5 secs | 30 secs |

Exhibit "O" to Sweeney Decl.

Mann's Tasings of Lambert

| Number of uses | Length of use | Lapse of time since last use |
|---|---|---|
| 1 | 3 sec | n/a |
| 2 | 5 sec | 29 secs |

Exhibit "S" to Sweeney Decl.

The overwhelming number of electrical shocks (20) of Lambert for a period of eighty-seven (87) seconds dwarfs the seven (7) tasings the Fourth Circuit denounced in *Meyers*. The seven unconstitutional tasings in *Meyers* lasted twenty seconds. Here, the shocks to Lambert were nearly four and a half times greater.

Moreover, no reasonable police officer could perceive that Linwood Lambert posed a threat to the officers or others.

### F. The Officers' Conduct in Tasing Lambert in the Back of the Police Cruiser Violates the Fourteenth Amendment

Though the initial calculus is measured under a Fourth Amendment standard, it shifts to a Fourteenth Amendment analysis after an individual is detained. *Orem*, 523 F.3d at 446. The Fourth Circuit's holding in *Orem* is directly on point and relates to the officers' conduct after Corporal Bratton announces that Lambert was under arrest. When this occurs, the calculus shifts from a Fourth Amendment analysis to a Fourteenth Amendment analysis because excessive force claims of a pretrial detainee or arrestee are governed by the Fourteenth Amendment. *See Orem*, 523 F.3d at 446. Though an individual does not need to be charged in order for the Fourteenth Amendment to apply, an individual's status as an arrestee "requires application of the Fourteenth Amendment" to that person's claim. *Id.* To succeed on a Fourteenth Amendment excessive force claim, a plaintiff must show that the officer "inflicted unnecessary and wanton pain and suffering." *Id*. (citing *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998)). In *Orem*, the Fourth Circuit set forth the standard under the Fourteenth Amendment:

> In determining whether [this] constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted and whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

*Id*. (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

In *Orem,* the Fourth Circuit concluded that tasing a handcuffed and foot shackled arrestee in the back of a police car for 1.5 seconds was unreasonable and the defendants were not afforded qualified immunity. *Id*. at 448. The *Orem* Court acknowledged that tasing an individual results in significant injuries even when visible signs are not present:

> A stun gun inflicts a painful and frightening blow, which temporarily paralyzes the large muscles of the body, rendering the victim helpless. This is exactly the sort of torment without marks…which if inflicted without legitimate reason, supports the Eighth Amendment's objective component.

*Id.* (rejecting officers' argument Fourteenth Amendment Claim was precluded because 1.5 seconds of tasing only inflicted *de minimis* injuries)(citing *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993)).

In *Orem,* the plaintiff was arrested for disrupting and assaulting a police officer. *Id.* at 444. At the time of the incident, plaintiff was under the influence of prescription drugs, marijuana, and alcohol. *Id.* Three police officers arrested plaintiff. *Id.* They handcuffed and shackled her. *Id.* The officers placed her in the back of a police cruiser. *Id.* While being transported to jail, Ms. Orem yelled, cursed and banged her head against the police car window three or four times. *Id.* Her movement in the back of the vehicle was so intense the officer pulled over during the transport. *Id.* When the transporting officer pulled the vehicle over he drive stunned a handcuffed, shackled and unarmed Ms. Orem on two occasions for a combined 1.5 seconds. *Id.* The court rejected the officers' argument that they were entitled to qualified because it found the tasing "was an 'unnecessary and wanton infliction of pain."' *Id.* at 447.

The United States Supreme Court recently held that a Fourteenth Amendment claim under Section 1983 is analyzed under an "objectively unreasonable" standard. *Kingsley v. Hendrickson,* — U.S. —, 135 S. Ct. 2466, 2470 (2015)(reversing defense verdict in favor of prison officials who applied a Taser to a handcuffed pretrial detainee for approximately five seconds because a plaintiff is not required to show defendants' subjective state of mind). The Due Process Clause of the Fourteenth Amendment prohibits treating pretrial detainees in a manner that "amount[s] to punishment." *Bell v. Wolfish,* 441 U.S. 520, 565 (1979). The United States Supreme Court has explained actions imposed for the purpose of punishment means taking a "'deliberate act intended to chastise or deter.'" *Wilson v. Seiter,* 501 U.S. 294, 300, 1991) (quoting *Duckworth v. Franzen,* 780 F. 2d 645, 652 (7th Cir. 1985)); *see also Bell,* 441

U.S. at 537-538. The Court in *Bell* recognized that intent to punish need not be "expressed" and can be established with circumstantial evidence. *Bell*, 441 U.S. at 538.

Here, there is actual and demonstrable evidence that after the officers placed Lambert under arrest, they intended to punish him and inflict pain and suffering for not responding to their verbal commands. Exhibit "J" to Sweeney Decl. at 18:00-18:12. Corporal Bratton and Officer Clay's tasings of Linwood Lambert in the back of the police cruiser are far more egregious than what occurred in *Orem*. The officers' gratuitous tasings while Lambert was handcuffed, shackled and confined in the back of the police cruiser constitutes an "unnecessary and wanton infliction of pain." *Id.* at 447. Lambert is defenseless, cuffed, shackled, unarmed and cannot retreat from the rear compartment of the police cruiser. Exhibit "J" at 18:00-18:49. The video depicts the Corporal Bratton and Officer Mann torturing Lambert in the back of the police cruiser because of his failure to sit up. *Id.* Corporal Bratton and Officer Mann wantonly deploy their tasers on Lambert, inflicting more pain. This misconduct is far worse than the tasings the Fourth Circuit's condemned in *Orem*.

The officers' conduct can hardly be "objectively reasonable" when it would satisfy the definition of "torture" under federal law. 18 U.S.C. § 2340 provides in pertinent part:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-

altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

Corporal Bratton and Officer Mann, acting under the color of law, intentionally deployed their tasers on Lambert while he was completely restrained and confined in the rear compartment of the police cruiser. They did so for the sole purpose of inflicting pain on their pre-trial detainee. Lambert experienced visible severe physical and mental pain and suffering while in their custody and control. Because the use of tasers is strictly prohibited on a restrained and confined person under federal law and South Boston Police guidelines, the administration of the tasers on Lambert cannot be "incidental to lawful sanctions." Instead, the officers acted with the sole purpose of inflicting pain even after Lambert begged them to stop. If the officers' conduct could meet the definition of "torture" under 18 U.S.C. § 2340, it cannot, at the same time, be reasonable and permissible under the Fourteenth Amendment. *See generally*, *Orem*, 523 F.3d at 448.

**F. Defendants Are Unaware They Obliterated the Bright Line Prohibition Against Taser Use on an Unarmed, Restrained Citizen**

*Meyers* clearly established in May of 2013 that police officers' tasering of a citizen who was unarmed and handcuffed violated that citizen's right to be free from the use of excessive and unreasonable force under the Fourth Amendment. Likewise, *Orem* also clearly established that as of May 2013 the tasering of an individual under arrest who is handcuffed and shackled in the rear of the police cruiser violates the Fourteenth Amendment. Yet, Defendants' arguments in favor of summary judgment reveal a total lack of awareness of these bright line tests set forth in *Meyers, Orem* and the South Boston Police Departments own written policies. The South Boston Police Department Use of Force Policy forbids: (1) deploying a taser on a suspect who is "restrained" and (2) threatening to use force on a restrained individual for not complying with verbal directives. In their Motion, the Defendants assert that the purpose of tasing Lambert was to get him to comply with their verbal commands:

> "Both the use of Tasers and manual pain compliance techniques were ineffective in getting Mr. Lambert….to comply with the officers' directions." Defts' Mem. of Law at 8.
> "Mr. Lambert refused to comply with the request to 'sit up' even when a Taser was placed against his shoulder (but still not deployed)." *Id.*
> "He was even warned that if he did not sit up he would be tased again." *Id.*
> "[T]he video evidence clearly demonstrates that at no time did Linwood Lambert, Jr. comply with a command *prior* to a use of force application, including the use of a Taser." *Id.* at 24. (emphasis in original).

Defendants' request for qualified immunity hinges on their belief that the threats of tasing and the tasings themselves were permissible because he did not "comply with the officers directions." To maintain such a position requires either an ignorance of *Meyers*, *Orem* and the South Boston Police Department's written policies or an outright willful rejection of the bright lines they set forth. Here, *Meyers*, *Orem* and the South Boston Police Department policies prohibit the officers' actions in deploying (and threatening to deploy) their tasers multiple times on a unarmed and restrained while he was seated on the ground in front of the hospital and while he was confined in the rear of the police cruiser. Defendants rely on the expert opinion of John Combs who claims that the use of "Taser deployments" were "reasonable." Defts' Mem of Law at 21 (citing Report of John Combs at p. 8). During his deposition, however, Mr. Combs admitted he was unaware of the dictates of *Meyers*, *Orem* and the South Boston Police Department Use of Force Policy.[3] Defendants' expert cannot testify about whether the officers' conduct was reasonable when his opinions disregard that the unlawfulness of the officers' conduct was clearly established by the Fourth Circuit in *Meyers* and *Orem.*

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[3] Mr. Combs deposition was conducted on December 18, 2015. At the time of this filing, Plaintiff has not received the transcript but will supplement this citation upon receipt.

Through the Defendants argue that their use of force was permissible because Lambert was not following their directions, the videos cast doubt on that argument. The Defendants' claims that Lambert failed to comply with those directives presupposes, after being jolted with hundreds of thousands of volts of electricity, that he was physically able to "sit up" in the back of the police car or "get on your stomach" while he was on the ground in front of the hospital. While the video depicts the officers barking orders at Lambert as he sits on the ground, as quoted above, Lambert repeatedly tells the officers that he cannot comply with their commands:

| | |
|---|---|
| Bratton: | You understand every time you do this, I'm going to pop you. |
| Lambert: | Ok, ok, ok. |
| Bratton: | Stop. |
| Lambert: | Ok. |
| Bratton: | Stay down, stay down. |
| Clay: | Roll back over. |
| Lambert: | (Howling). |
| Bratton: | Turn around. |
| Bratton: | Turn around. |
| Clay: | Get on your belly. |
| Bratton: | Get on your stomach. |
| Clay: | Get on your belly. |
| Clay: | Roll over. |
| Bratton: | Roll over. |
| Mann: | Roll over. |
| Lambert: | (Inaudible). |
| Bratton: | Roll over. |
| Mann: | Roll over. |
| Clay: | Get on your belly. |
| Lambert: | Ok. |
| Bratton: | I'm going to light you up again, roll over. |
| Bratton: | Roll over. |
| Lambert: | **You said roll over**. |
| Bratton: | Roll over. |
| Lambert: | **Ok**. |
| Mann: | (Inaudible) |
| Mann: | Roll over, get on your belly. |
| Bratton: | Get on your stomach. |
| Mann: | Get on your belly. |
| Bratton: | Get on your stomach. |
| Lambert: | Ok. |
| Clay: | Get on your stomach. |

| | |
|---|---|
| Lambert: | **Ok. I am. I'm trying to get on my stomach right now**. |
| Bratton: | Roll around, get on your stomach. Roll around. |
| Lambert: | **I'm trying. I'm trying right here.** |
| Bratton: | Roll around. |
| Lambert: | **I'm trying here.** |
| Bratton: | Roll around. |
| Lambert: | **I can't do it.** |
| Bratton: | Roll around. |
| Lambert: | (Inaudible). |

Exhibit "I" to Sweeney Decl. at 7:41-8:51 (emphasis added).

Defendants say nothing of Lambert's statements that he cannot comply, nor do they mention his pleas for mercy, "Why y'all trying to kill me?", "Please don't do this to me", "Please officer", and "Don't do it to me baby." Exhibit "I" at 7:41 through 11:26. Instead, they assert that this unarmed, defenseless and handcuffed citizen who beseeched the officers to stop hurting him was violent and out-of-control. This argument need not detain the Court very long because the video plainly depicts the officers applying excessive amounts of force on a person who was restrained and under their control in violation of clearly established constitutional rights.

### G. Officer Bratton, Officer Mann and Officer Clay Violated Linwood Lambert's Fourteenth Amendment Right to Medical Attention

"The Fourteenth Amendment Right of pretrial detainees, like the Eighth Amendment right of convicted prisoners requires that government officials not be deliberately indifferent to any serious medical needs of the detainee." *See Belcher v. Oliver*, 898 F.2d 32, 34 (4th Cir. 1990). Consequently, pretrial detainees have a "clearly established" right "to medical attention, and prison officials violate detainees' rights to due process when they are deliberately indifferent to serious medical needs." *Gordon v. Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992) (citation omitted); *see also Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

Though Linwood Lambert was a pretrial detainee and not a convicted prisoner, Plaintiff's claim for deprivation of medical care is analyzed under the due process clause of the Fourteenth

Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1998). The due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). This means that "while the convicted prisoner is entitled to protection only against punishment that is 'cruel and unusual,' the pretrial detainee may not be subjected to **any** form of punishment." *Martin*, 849 F.2d at 870 (4th Cir. 1998)(emphasis added).

Failure to provide adequate medical care to a detained individual rises to the level of a constitutional violation when there is "deliberate indifference" to an individual's serious medical needs. *See Estelle*, 429 U.S. at 105 ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment"). Deliberate indifference is established if the arresting officers were "aware of facts from which the inference could be drawn that a substantial risk of harm exists," and the officers "must also [have drawn] the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). An officer has the required level of awareness necessary to establish reckless indifference if the detainee's need for medical attention was both "apparent and serious." A medical need is "serious" if it is one that has "been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreeve*, 535 F.3d 225, 241 (4th Cir. 2008). Corporal Bratton admits that denial of medical care is a clearly established constitutional right. *See* Exhibit "E" to Sweeney Decl. at 10-11 and 70. The deprivation of medical care is unconstitutional when it is, "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *See Miller v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990). Here, it is simply unconscionable that the officers never attempted to get Lambert the medical care he needed though they were mere feet from inside the emergency room.

Before the tasings even occurred, however, the officers were transporting Lambert to the hospital under an Emergency Custody Order for an apparent mental/physical condition which by Officer Mann's own admission is a "medical emergency." Exhibit "C" at 13; Exhibit "H" at 43. Lambert's mental/physical status did not improve from the time they first encountered him at the Super 8 motel, until leaving the hospital after Lambert had been tased. In fact, it got worse. *See* Exhibit "P" at 1:58-2:30. Mr. Lambert's physical condition after the tasings is reflected in Officer Mann's photographs. *See* Exhibit "Q to Sweeney Decl." The photographs depict Mr. Lambert profusely bleeding following the tasing in front of the emergency room. *See id.* Despite the fact that he had visible injuries and had been tased on several occasions, the officers determined that he did not require medical attention. *See* Exhibit "C" to Sweeney Decl. at 50.

As stated above, the SBPD policy mandates that officers obtain immediate medical attention for prisoners needing it following the arrest. *See* OPR 211 – Prisoner/Detained Persons Transports attached to Sweeney Decl. as Exhibit "V." SBPD OPR 211 states in relevant part, "If an officer observes that a person becomes sick or injured after an arrest, the arresting/transporting officer will immediately obtain medical attention for the prisoner." *Id*. Immediately in front of the emergency room doors, Officer Mann laughs at Lambert and says that he is "bloody as a hog" and "fucked up*.*" *See* Mann Dash Cam Video at 1:58-2:30 attached to Sweeney Decl. as Exhibit "P." The policy is mandatory and the officers must follow the policy and do not have discretion to violate it. *See* Exhibit "E" to Sweeney Decl. at 51. In violation of the South Boston Police Policies, the officers do not get Lambert any medical aid.

The Federal taser guidelines are consistent with SBPD policy and state that like all weapons, tasers are "not harmless, and the potential for injury can be exacerbated by inappropriate use and deployment of the devices." U.S. Department of Justice, 2011 Electronic Control Weapon Guidelines attached to Sweeney Decl. as Exhibit "CC" at p. 10. In fact, the Federal taser guidelines provide as follows:

> Indeed, in July 2010 the American Academy of Emergency Medicine issued a Clinical Practice Statement advising physicians that they should consider additional evaluation and treatment for individuals who experienced an ECW application longer than 15 seconds (Vilke et al. 2010).
>
> * * * * *
>
> Although causation factors are not clear, the most common factors that appear to be associated with fatal and other serious outcomes include 1) repeated and multiple applications, 2) cycling time that exceeds 15 seconds in duration, whether the time is consecutive or cumulative, and 3) simultaneous applications by more than one ECW. **Officers must be trained to understand that repeated applications and continuous cycling of ECWs may increase the risk of death or serious injury and should be avoided.**

*Id.* at 13. (emphasis added).

Because of the dangers posed by taser use, the Federal guidelines mandate:

> 36. All subjects who have been exposed to ECW application should receive a medical evaluation by emergency medical responders in the field or at a medical facility. Subjects who have been exposed to prolonged application (i.e., more than 15 seconds) should be transported to an emergency department for evaluation. Personnel conducting the medical evaluation should be made aware that the suspect has experienced ECW activation, so they can better evaluate the need for further medical treatment.

Though the Federal taser guidelines instruct emergency medical treatment is necessary if deployment exceeds fifteen seconds, in this case, Defendants exposed Lambert to eighty-seven (87) seconds of electrical shocks outside of the emergency room. *See* Exhibits "N" and "O" to Sweeney Decl. and Taser Log of Officer Clinton Mann attached to Sweeney Decl. as Exhibit "S." As a result, it cannot be said that Defendants' decision not to provide medical care to Lambert was reasonable.

Plaintiff's police practices expert, Melvin Tucker opines:

> 112. Either Corporal Tiffany Bratton and Officers Clifton Mann and Travis Clay were plainly incompetent or they knowingly violated clearly established law enforcement training on how to handle a person exhibiting the symptoms of what could be characterized as "excited delirium" when they failed to treat the incident with Linwood Raymond Lambert as a medical emergency and instead treated the incident as a control and arrest situation.

Affidavit of Melvin Tucker at ¶112 attached to Sweeney Decl. as Exhibit "CC."

Mr. Tucker criticizes the Defendants' experts' opinions that it was acceptable to transport Linwood Lambert to the jail from the hospital instead of getting him emergency medical care. *Id.* at ¶¶ 89-91. Mr. Tucker states that law enforcement officers are trained (since as early as 2011) "to be alert for the symptoms of excited delirium syndrome such as hallucinations, extreme agitation, screaming, property damage, profuse sweating, cocaine use, glass breakage and bizarre behavior" and that incidents of excited delirium should be treated as a medical emergency rather than a criminal incident. According to Officer Bratton and Officer Mann, only medical attention he required was a band aid. *See* Sweeney Decl. Exhibit "E" at 157-158 and Exhibit "H" at 75.

Additionally, TASER's warnings and instructions notify the officers that Lambert had an obvious, apparent and serious medical condition. Officer Bratton, Officer Mann and Officer Clay admit that they had obligation to know, understand and follow all of TASER's warnings and instructions which were in effect on May 4, 2013. *See* Sweeney Decl. Exhibit "C" at 66 and Exhibit "E" at 17-18. The TASER warnings and instructions which were in effect on May 4, 2013 advised Officer Bratton, Officer Mann and Officer Clay that: (1) use of a taser involves risks that a person may get hurt or die due to the effects of the CEW [the taser]; (2) 15 seconds of tasing (continuous or cumulative) increased Lambert's risk of dying; (3) use of the taser in dart mode constitutes an "immediate significant level of force"; (4) any taser exposure could kill an agitated or intoxicated individual; (5) minimize the number and duration of taser exposures; (6) to avoid simultaneous tasing because of the cumulative effect of the tasing and the increased risk to the individual being tased; and (7) ineffective use of the taser creates an increased risk of death or harm to the individual being tased. *See* Sweeney Decl. Exhibit "W" at 1-2 and Exhibit "Y."

Officer Bratton admitted that common sense would require her to obtain medical attention to save someone's life. *See* Sweeney Decl. Exhibit "E" at 58. Officer Bratton failed to acknowledge that Mr. Lambert required immediate medical attention:

> Q. Okay. Now, you would agree with me that had he been provided immediate medical attention, and by "immediate," I mean at the hospital would that have given him a better chance of surviving.
> A. I have no idea.
> Q. Okay. But you'd agree with me he wasn't even given that opportunity, correct, because he didn't receive care at the hospital?
> A. I will say this: Mr. Lambert's actions created our reactions. So I am so sorry that Mr. Lambert died, but Mr. Lambert's actions were the reason that Mr. Lambert died; not because he was tasered and not because we didn't take him to the ER.
> Q. Had you followed TASER's warnings and instructions on May 4, 2013, would Mr. Lambert have passed away?
> A. I have no idea.

*Id*. at 56.

The officers left the hospital without obtaining medical care for Lambert. *See* Exhibit "J" to Sweeney Decl. at 21:14-21:24. Before leaving the hospital, the Officers never: (1) checked Lambert's vital signs; (2) asked him if he was in pain; (3) asked him if he was having difficulty breathing; or (4) asked him if he was dizzy. *See* Exhibit "E" to Sweeney Decl. at 161. Clay admits that TASER training required him to complete a physical assessment which includes checking vital signs and asking the individual if they are in pain. *See* Exhibit "M" to Sweeney Decl. at 198-199. The officers failed to complete this assessment.

The SBPD's former lead TASER instructor, Sgt. Greg Gilliam admits that Lambert required immediate medical treatment *See* Greg Gilliam Dep., 11/18/15, attached to Sweeney Decl. as Exhibit "DD" at 85. When asked if an individual in Mr. Lambert's situation requires immediate medical attention, he provides the following testimony:

> Q. And if an individual, after they're tased, strikes their head and they're bleeding from their head, is that the type of injury that requires immediate medical attention?
> A. I would – I would say yes.

*Id*. According to Gilliam, immediate medical attention means "right now." Defendants' contention that Lambert could not have been treated in the emergency room under police supervision lacks merit. At the time of the incident, 99 percent of all medical and mental evaluations of a suspect were completed under police supervision inside of Halifax Regional Hospital. *Id*. at 90.

When asked what the phrase "bloody as a hog" meant, Gilliam testifies: "Two Saturdays ago I gutted a deer that I killed. I had my shirt rolled up. You couldn't see any white on me or my arms. It was complete blood. My britches leg where I had rolled the guts out of the deer's carcass, both britches legs were soaked with blood. I would say that's bloody as a hog." *See* Exhibit "EE" to Sweeney Decl. at 95.

Reckless indifference can be manifested when officers intentionally deny or delay access to medical care. *See Smith v. Smith*, 589 F.3d 736, 738-739 (4th Cir. 2009). According to Officer Clay, Corporal Bratton made the decision not to obtain medical attention for Mr. Lambert prior to leaving the hospital grounds. Sweeney Decl. Exhibit "C" at 12. Approximately twenty (20) minutes elapsed from the moment the officers first tased Mr. Lambert and they departed the hospital for the jail. *See* Exhibit "C" to Sweeney Decl. at 12.

The officers knew or should have known that medical professionals in the emergency room could have sedated Mr. Lambert or used restraints in order to evaluate his physical condition. *See* Sharon Garrett Dep., 11/17/15, attached to Sweeney Decl. as Exhibit "EE" at 41-43; *see also* Exhibit "C" to Sweeney Decl. at 187, Exhibit "DD" to Sweeney Decl. at 91. Prior to May 4, 2013, Officer Bratton had taken arrestees into Halifax Regional Hospital for medical attention under police custody. Exhibit "EE" to Sweeney Decl. 33-34. Bratton knew that Lambert needed to be brought to the emergency room in order to be "medically cleared." *See* Sharon Garrett Dep., 11/17/15, attached to Sweeney Decl. as Exhibit "EE" at 39.

### H. Defendants' Request for Summary Judgment on Counts II and III of the Amended Complaint on the Issue of Proximate Causation Is Premature

Defendants seek dismissal of Count II (wrongful death) and Count III (survival action) of the Amended Complaint claiming a lack of record evidence on the issue of proximate causation. This request is premature because on August 6, 2015 this Court ordered:

> Discovery shall be stayed related to the Town of South Boston and the claims against the chief and deputy chief of police, as well as the state law claims against all defendants.

Exhibit "FF" to Sweeney Decl.

Since August 6, 2015, discovery on Plaintiff's wrongful death and survival claims has been stayed. Defendants requested, and this Court agreed, that discovery would commence solely on the issue of the Defendants' claim for qualified immunity. *Id.* Plaintiff has not produced medical causation reports on her state law wrongful death and survival action claims because she was prohibited from doing so under the Court's August 6, 2015 Order. Defendants cannot turn around, as they do here, and seek dismissal as a result of Plaintiff's compliance with the Court's August 6, 2015 Order.

In support of their causation arguments, Defendants rely exclusively on the autopsy report of Jennifer Bowers, M.D. to claim that Linwood Lambert died exclusively from "acute cocaine intoxication." If Plaintiff was required to establish medical causation at the qualified immunity stage, and she is not, Dr. Bowers opinions raise issues of fact which preclude the entry of summary judgment. In fact, Dr. Bowers has acknowledged in her deposition that her opinions as to the cause of Linwood Lambert's death were based on incomplete information because she had not reviewed the video footage of the SBPD encounter with Linwood Lambert. As a result, Dr. Bowers announced that she is preparing a new or supplemental report. The fact that a second autopsy report is forthcoming warrants denial of this motion for summary judgment.

The cause of death is not relevant to the overall question of whether the Defendants violated Linwood Lambert's constitutional rights. Plaintiff need not prove the Defendants killed Linwood Lambert to establish they used excessive and unreasonable force which caused injuries. Defendants bizarrely claim that because there was no evidence of a brain injury or other internal injuries they are entitled to immunity. Even if the Court overlooks the gruesome video evidence of the visible pain and suffering Linwood Lambert endured at the hands of the Defendants, the Fourth Circuit has clearly instructed that taser shocks cause constitutionally cognizable injuries. *Orem*, 523 F.3d at 448. Even in *Orem*, the Court found that there only 1.5 seconds of taser shock was sufficient for a constitutionally cognizable injury. *Id.* ("A stun gun inflicts a painful and frightening blow, which temporarily paralyzes the large muscles of the body, rendering the victim helpless. This is exactly the sort of torment without marks…which if inflicted without legitimate reason, supports the Eighth Amendment's objective component").

## I. This Court Cannot Accept Defendants' Factual Assertions When they Lack Citation to the Record.

Federal Rule of Civil Procedure 56(c) requires that a party asserting that a fact cannot be or is genuinely disputed to support its position by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials…" F.R.C.P. 56(c)(a)(1). Defendants make several allegations in their Brief which fail to cite the record. The most egregious examples are cited below:

- "Both the use of Tasers and manual pain compliance techniques were ineffective in getting Mr. Lambert under control and getting him to comply with officers' directions." Defts' Mem. of Law at 6.
- Defendants' allegations that Lambert was "destructive, extremely violent, aggressive, and out-of-control. *Id*. at 14.
- Defendants' contention that Lambert "displayed both the ability and willingness to use violence in destruction of property, and presented an actual threat to the safety of the Officers, any hospital personal and any citizens that might be in the vicinity." *Id.* at 20.
- Defendants' contention that the taser deployments on Linwood Lambert were "ineffective." *Id.* at 21.
- "No force was used against Mr. Lambert once he was secured, restrained, and compliant." *Id*. at 26.

In addition to being untrue, this Court cannot accept these statements of "fact" when Defendants fail to cite to any record evidence to support them.

## IV. CONCLUSION

Based on the foregoing reasons, Defendants, Tiffany Bratton, Clinton Mann and Travis Clay are not entitled to qualified immunity for their actions on May 4, 2013 which violated Linwood Lambert's clearly established constitutional rights.

Respectfully submitted,

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Dated: December 30, 2015

## CERTIFICATE OF MAILING

I hereby certify that on the 30th day of December, 2015, a true a correct copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment On The Issue of Qualified Immunity and was served electronically upon:

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